

Brief April 2001

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2001 Capital Punishment Update



Across the country, legislators are tackling difficult challenges and looking to improve their state's respective capital punishment systems. Ten states are currently considering legislation to abolish the death penalty altogether (Connecticut, Illinois, Maryland, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Pennsylvania, and Virginia), and two others are attempting to pass legislation to prohibit racially motivated impositions of the death penalty (Georgia and North Carolina). Conversely, legislators in four states without capital punishment have introduced legislation to allow for the imposition of the death penalty (Massachusetts, Michigan, Minnesota, and Vermont).

Texas leads the nation in executions, having set a new record with 40 offenders executed last year and a total of 245 since the reinstatement of the death penalty following the United States Supreme Court's (the Court) 1972 decision in *Furman v. Georgia*.¹ During the 77th Legislature, members of the Texas House of Representatives (the House) and the Texas Senate (the Senate) have filed several bills related to capital punishment.

Capital Punishment Sentencing Options

Changes in Texas' capital punishment scheme are the subject of five bills introduced this session. Some legislators seek taking away the option of parole for convicted capital criminals. The majority of the bills offer a middle ground for juries that may not believe a defendant should be executed, but also do not want the defendant to become eligible for parole in the future.

Recent polls show that at least 70 percent of Texans would approve of implementing a life without parole sentencing option in capital cases.² Polls also show that over 70 percent of Texans favor the continued use of the death penalty for capital punishment, even when an alternative to the death penalty is life without parole.³

Currently in Texas, sentencing juries are instructed to consider all the evidence introduced at trial in answering two "special issues" or questions during the punishment phase of a capital murder trial: whether the defendant poses a continuing threat to society, and whether there are any mitigating circumstances that merit a life sentence instead of death.

Upon answering those questions, the judge will sentence the defendant to death or life imprisonment according to how the jury decided. In Texas, life imprisonment allows for defendants to become eligible for parole after serving at least 40 years of their sentence.

H.B. 869, by Representative Dutton, would make a defendant sentenced to a "life" sentence for a capital felony ineligible for parole, with the jury being so advised at the time of deliberation, thus allowing for only two sentencing options: death or life without parole.

H.B. 30, by Representative McClendon, H.B. 365, by Representative Hinojosa, H.B. 632, by Representative Turner of Harris, and S.B. 85, by Senator Lucio, all keep both the current death and life sentences, but also provide the third sentencing option for capital crimes of life imprisonment without parole. A committee substitute to H.B. 365 successfully passed out of the House Criminal Jurisprudence Committee and is currently before the Calendars Committee.



Like H.B. 365, the committee substitute to S.B. 85 adds the third sentencing option of life without parole, with the sentencing jury's verdict tied to answering the special issues presented in current cases. S.B. 85 also provides for what to do when the state does not seek the death penalty in a capital case. A committee substitute to S.B. 85 successfully passed out of the Senate Criminal Justice Committee and is before the full Senate.

The Death Penalty and Persons with Mental Retardation

Currently, the United States Supreme Court (the Court) is revisiting the issue of whether the execution of persons with mental retardation offends society's "evolving standards of decency"⁴ and whether the Eighth Amendment of the United States Constitution bans the execution of persons with mental retardation as "cruel and unusual" punishment. In March 2001, the Court heard arguments in the case of Texas death-row inmate, Johnny Paul Penry, whose attorneys say has an I.Q. between 51 and 63.⁵ The Court is also scheduled to hear arguments in the case of North Carolina death-row inmate Ernest McCarver, whose attorneys say has an I.Q. of 67.

In 1989, the Court considered *Penry v. Lynaugh*,⁶ and ruled that his death sentence was not a violation of the Eighth Amendment. The Court overturned his conviction, however, and held that Penry's mental capacity and history of abuse should have been considered by the jury. As a result of the Court's ruling, in 1991 the Texas Legislature revised the special issues used in capital cases to include a mitigation question addressing those concerns.

Other states went even further regarding the execution of persons who may be less culpable for their crimes due to a determined inability to understand the consequences of their actions. Thirteen of the 38 states with capital punishment have since passed legislation to prohibit the execution of individuals that are determined to be persons with mental retardation (Please refer to the chart on page 3). Eight of those states consider an individual's I.Q. level to define or presume mental retardation (Arkansas, Kentucky, Maryland, Nebraska, New Mexico, South Dakota, Tennessee, and Washington).

The federal death penalty statute also forbids such executions and in 1989, the American Bar Association established a policy opposing the execution of defendants with mental retardation.

Since 1976, six defendants with I.Q. scores alleged between 58 and 76 have been executed in Texas. Legislators in both the House and the Senate are considering bills related to the applicability of the death penalty to offenders with mental retardation. Two of the proposed bills discussed below have similar IQ thresholds, whereby mental retardation is presumed.

All of the legislation introduced regarding the execution of persons with mental retardation incorporates the definition of mental retardation found in the Texas Health and Safety Code

(H&SC). According to the H&SC, Section 591.003, mental retardation means "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."

H.B. 242, by Representative Gallego, H.B. 1247, by Representative Turner of Harris, and its companion, S.B. 686, by Senator Ellis, all explicitly prohibit a defendant who is found to be a person with mental retardation from being sentenced to or punished by death. H.B. 236, by Representative Hinojosa, H.B. 242, H.B. 1247, and S.B. 686 also provide for some form of a hearing process to determine whether the defendant is a person with mental retardation, including the possible involvement of "disinterested experts." H.B. 1247 and S.B. 686 include an "interlocutory appeal" by either the defendant or the state, whereby a court's finding, or a court's decision not to make a finding relating to the defendant's mental retardation, could be addressed by a court of criminal appeals prior to the actual trial on the merits.

Under H.B. 1247, defendants are presumed to have mental retardation if they have an I.Q. of 65 or less. If a defendant has an I.Q. higher than 65, that defendant may still be found to be a person with mental retardation. If the jury finds in the affirmative and that defendant is subsequently convicted of a capital offense, the court will impose a sentence of life imprisonment.

H.B. 236 does not specify a minimal I.Q. score and if the jury finds the defendant to be a person with mental retardation, it can then consider whether such evidence mitigates the defendant's moral blameworthiness. With findings in the affirmative, the court will sentence that defendant to a life, rather than death sentence.

Under S.B. 686, the court, rather than the jury, would make the determination whether the defendant was a person with mental retardation. Similar to H.B. 1247, S.B. 686 provides that a defendant who has an I.Q. of 70 or less is presumed to be a person with mental retardation at the time of the commission of the alleged offense, but both bills' presumptions of mental retardation can be challenged by the prosecution.

As of April 2001, eight states, in addition to Texas, have introduced legislation specifically prohibiting the imposition of the death penalty on persons with mental retardation or severe developmental disabilities (Arizona-passed out of the Senate, Florida-passed out of the Senate, Mississippi, Missouri, North Carolina, Oklahoma, and Oregon).

Moratoriums and Death Penalty Study Commissions

Since 1972, seven people have been released from death row by Texas courts. Recent polls have shown some support for a moratorium, including for inmates whose cases might be affected by DNA testing.⁷ Other polls reflect the belief of some Texans that an innocent person has been executed.⁸

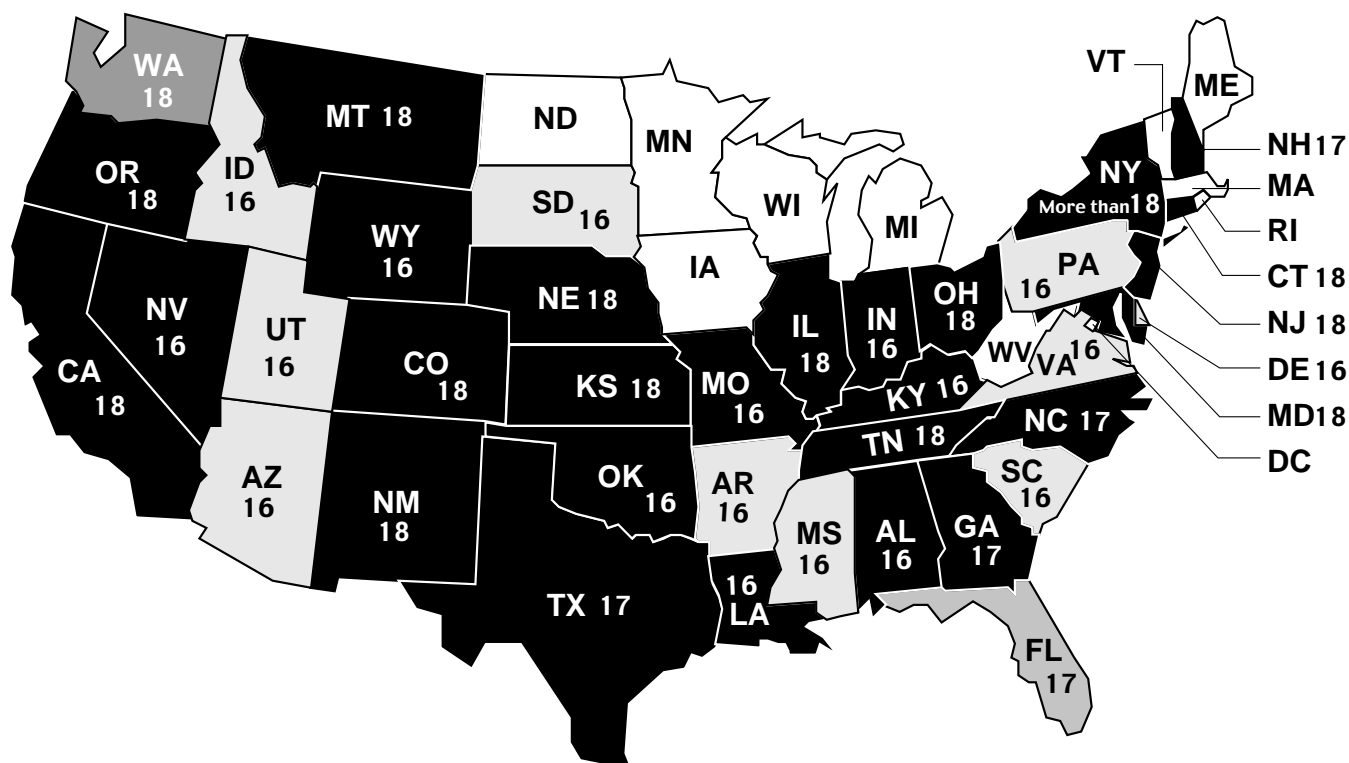


STATE STATUTE (with Title or Code reference)	SENTENCING OPTIONS; SENTENCING AUTHORITY	BANS THE EXECUTION OF THE MENTALLY RETARDED
ALABAMA: Section 13A-5-46, Criminal	Death or life without parole; Judge	NO
ARIZONA: Section 13-703, Criminal	Death, life without parole, or 25-35 years to life; Judge	NO
ARKANSAS: Section 5-4-602, Criminal Offenses	Death or life without parole; Jury	YES
CALIFORNIA: Section 190.3, Penal	Death, life without parole, or 25 years to life; Jury	NO
COLORADO: Section 16-11-103, Criminal Procedure	Death or life without parole; Three-judge panel	YES
CONNECTICUT: Section 53a-46a, Penal	Death or life without parole; Jury	NO
DELAWARE: Section 4209, Crimes and Criminal Procedure	Death or life without parole; Judge	NO
FLORIDA: Section 921.141, Criminal Procedure	Death or life without parole; Judge	NO
GEORGIA: Section 17-10-30 to -32, Criminal Procedure	Death, life without parole, or life (sentences vary); Jury	YES
IDAHO: Section 19-2515, Criminal Procedure	Death or life (sentences vary, including life without parole); Judge	NO
ILLINOIS: 720 ILS 5/9-1, Criminal	Death or life without parole; Jury	NO
INDIANA: Section 35-50-2-9, Criminal Law and Procedure	Death or life without parole; Judge	YES
KANSAS: Section 21-4624, Crimes and Punishments	Death or mandatory 40-50 years to life; Jury	YES
KENTUCKY: Section 532.025(1)(b), Penal	Death, life without parole, 25 years to life, or mandatory 20-50 years; Jury	YES
LOUISIANA: Article 905, Criminal Procedure	Death or life without parole; Jury	NO
MARYLAND: Section 413, Crimes and Punishment	Death, life without parole, or 25 to life; Jury	YES
MISSISSIPPI: 99-19-101, Criminal Procedure	Death or life without parole; Jury	NO
MISSOURI: Section 565, Crimes and Punishment	Death or life without parole; Jury	NO
MONTANA: Section 46-18-301, Criminal Procedure	Death, life without parole, or 10-100 years term; Judge	NO
NEBRASKA: 29-2520, Criminal Procedure	Death or life (no mandatory minimum, includes life without parole); Three-judge panel	YES
NEVADA: Section 175.554, Procedure in Criminal Cases	Death, life without parole, 20 years to life, or mandatory 20-50 years; Jury	NO
NEW HAMPSHIRE: Section 630:5, Criminal	Death or life without parole; Jury	NO
NEW JERSEY: Section 2C:11-3, Criminal Justice	Death, life without parole, 30 years to life, or a term of 30 years without parole; Jury	NO
NEW MEXICO: Section 31-20A-3, Criminal Procedure	Death or 30 to life; Jury	YES
NEW YORK: Section 400.27, Criminal Procedure	Death, life without parole, or 20-25 years to life; Jury	YES
NORTH CAROLINA: Section 15A-2000, Criminal Procedure	Death or life without parole; Jury	NO
OHIO: Section 2929.03, Crimes	Death, life without parole, or 20-30 years to life; Jury	NO
OKLAHOMA: Section 701.11, Crimes and Punishment	Death, life without parole, or life (must serve at least 1/3 of sentence); Jury	NO
OREGON: Section 163.150, Crimes and Punishments	Death, life without parole, or 30 years to life; Jury	NO
PENNSYLVANIA: Section 9711(F), Judicial Procedure	Death or life without parole; Jury	NO
SOUTH CAROLINA: Section 16-3-20, Crimes and Offenses	Death, life without parole, or 30 years to life; Jury	NO
SOUTH DAKOTA: Section 23A-27A-4, Criminal Procedure	Death or life without parole; Jury	YES
TENNESSEE: Section 39-13-204, Criminal Offenses	Death, life without parole, or 25 years to life; Jury	YES
TEXAS: Article 37.071, Criminal Procedure	Death or 40 years to life; Jury	NO
UTAH: Section 76-3-207, Criminal	Death, life without parole, or life (sentences vary); Jury	NO
VIRGINIA: Section 19.2-264.4, Criminal Procedure	Death or life without parole; Jury	NO
WASHINGTON: Section 10.95.030, Criminal Procedure	Death or life without parole; Jury	YES
WYOMING: Section 6-2-102, Crimes and Offenses	Death or life without parole; Jury	NO




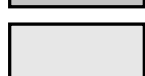
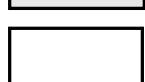


Minimum Death Penalty Ages

(Federal Government sets statutory minimum at 18 years old)



LEGEND: Source of Minimum Age

-  State statute
-  WA Supreme Court case of Furman v. Wood
-  FL Supreme Court case of Keith Brennan (1999)
-  United States Supreme Court case of Thompson v. Oklahoma (1988)
-  No Death Penalty



Texas is one of 11 capital punishment states with bills calling for a moratorium or temporary suspension of the execution of persons convicted of capital offenses similar to the one currently imposed in Illinois (Alabama, Connecticut, Kentucky, Maryland-passed Senate Committee, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas, and Virginia).

H.B. 1328, by Representative Dutton, gives power to set execution dates to the court of criminal appeals (rather than the trial court), but prohibits the court of criminal appeals from setting an execution date until September 1, 2003. H.B. 1328 successfully passed out of the House Criminal Jurisprudence Committee.

H.J.R. 56, by Representative Dutton, proposes a constitutional amendment to be submitted to Texas voters on November 6, 2001, to prohibit the Texas Department of Criminal Justice (TDCJ) from performing executions until September 1, 2003. H.J.R. 56 successfully passed out of the House Criminal Jurisprudence Committee.

H.J.R. 59, by Representative Naishtat, calls for a similar vote on a constitutional amendment to cease executions, though this bill places the power to order a moratorium on the death penalty in the hands of the governor on or after the order and until the order is revoked. H.J.R. 59 successfully passed out of the House Criminal Jurisprudence Committee.

Like H.J.R. 56, S.J.R. 25, by Senator Shapleigh, calls for a constitutional amendment vote and prohibits TDCJ from executing defendants convicted of capital crimes. S.J.R. 25, however, calls for the moratorium in order to permit an entity created by the 77th Legislature to complete and present to the 78th Legislature any studies on the administration of capital punishment in Texas and any recommended legislation to improve procedures in capital cases.

Companion bills S.B. 680, by Senator Shapleigh, and H.B. 720, by Representative Dutton, would create such an entity by establishing the Texas Capital Punishment Commission to study implementation of the death penalty. Texas is one of six states with legislation introduced to study its system of capital punishment (Connecticut, Missouri, Tennessee, Texas, Virginia, and Washington). Both S.J.R. 25 and S.B. 680 passed out of the Senate Criminal Justice Committee to the full Senate.

Other legislation such as H.B. 3622, by Representative Hochberg, seeks to further improve the criminal justice system through the creation of the Texas Innocence Commission (TIC). The TIC would be composed of 10 members appointed by the governor, including two members of the court of criminal appeals, two state prosecutors, two criminal defense lawyers, two legal academicians, and two representatives from the general public. The members would serve for staggered, six-year terms, study wrongful convictions, criminal investigations and trial practices, and submit a report to the governor, lieutenant governor, and speaker of the house containing recommendations for legislative or other action.

Minimum Age to Execute Capital Offenders

How young a defendant may be to be sentenced to death varies across the country from 16 years to “more than 18 years” (refer to chart insert). The majority of states have set a minimum age by statute. Others rely on the Court’s decision in *Thompson v. Oklahoma*,⁹ whereby no state without a minimum age in its death penalty statute can execute someone who was under 16 years at the time of the crime (refer to chart insert- states with an asterisk follow *Thompson*). Current Texas law treats 17 year olds as adults for general criminal justice purposes and therefore allows for the execution of 17 year-old offenders. Since 1991, Texas has executed seven persons who were 17 years old at the time they committed a capital offense.

H.B. 1860, by Representative Turner, would require a court to hold a hearing to determine whether a defendant who was 17 years old at the time of the commission of an offense was sufficiently mature to understand the consequences of the defendant’s actions. Disinterested experts may be appointed by the court to make such a determination. The jury may be instructed to consider the maturity of the defendant and whether that evidence is mitigating enough to reduce the defendant’s moral blameworthiness. The court, upon the required affirmative findings on the issue of maturity by the jury, would sentence the defendant to life imprisonment, rather than death.

Mississippi is a state with no existing statute providing a minimum death penalty age. At present, Mississippi has legislation pending that would prohibit the imposition of the death penalty on offenders under the age of 18 years.

Executive Clemency and the Board of Pardons and Parole

Legislators are also considering matters of clemency and the limited power of Texas governors to grant executive clemency in cases where a person is sentenced to death. Currently, reprieves and commutations of punishment are generally tied to the recommendation of a majority of the Board of Pardons and Paroles. H.J.R. 21 and its enabling legislation H.B. 260, both by Representative Gallego, would grant the governor sole authority to grant one reprieve and to commute a death sentence to life without the possibility of parole.

Texas legislators are also scrutinizing the role of the Board of Pardons and Paroles. At present, the 18-member board is not required to meet to discuss capital cases before voting on clemency recommendations, nor are the members required to explain or discuss their votes. S.B. 793, by Senator Ellis, would require the board to meet as a body to deliberate when reviewing capital clemency cases.



Other Related Legislation

Other bills have been filed that indirectly relate to the capital punishment issues described above. S.B. 3, by Senator Duncan, et al., which has already been signed by Governor Perry, will allow for the preservation of DNA evidence and post-conviction DNA testing, including those tests that are requested by death row inmates. The use of DNA testing in Texas has led to the recent release of several non-death row inmates from Texas' prisons who were imprisoned for crimes they did not commit.

Representative Gallego and Senator Ellis introduced H.B. 520 and S.B. 536, respectively, to increase the amount of financial compensation provided to wrongfully imprisoned inmates. Under current Texas law, a person wrongfully convicted of a crime is entitled to a maximum total compensation of \$50,000: \$25,000 compensation for medical expenses, and \$25,000 for physical and mental pain and suffering, regardless of the length of term served in prison.

A committee substitute to S.B. 536 provides for the expansion of the list of items that are authorized to be payable as damages in a claim for wrongful imprisonment; increases the statute of limitations for claiming compensation; and allows convicted persons found to be innocent to seek relief and compensation from the courts, rather than by pardon. This version of S.B. 536 successfully passed out of the Senate and has been referred to the House Civil Practices Committee.

Though the United States Constitution guarantees a defendant's right to a speedy trial and assistance of counsel, the effectiveness of counsel can vary greatly when the defendant is indigent. In Texas, the responsibility to appoint counsel falls on Texas' 254 counties. Texas is currently one of only four states that does not provide money for indigent representation at trial, despite recent statistics showing that over 90 percent of death row inmates in Texas are indigent.

S.B. 7, by Senator Ellis, et al., creates an indigent defense system that would set statewide competency standards in capital cases, improve attorney compensation, and establish new methods for judges to select counsel for indigent representation. At least \$20 million in funding will also accompany the bill in the form of state grants to assist counties currently shouldering the cost. S.B. 7 passed out of the Senate and has been referred to the House Criminal Jurisprudence Committee, where a companion bill, H.B. 1745, by Representative Hinojosa has been filed.

In the past three years, six other states (Colorado, Kentucky, Minnesota, New Mexico, North Carolina, and Oregon) have passed indigent defense legislation and two states (Alabama and Georgia) are currently considering similar changes.¹⁰

—by Rita Aguilar, SRC



ENDNOTES

¹ *Furman v. Georgia*, 408 U.S. 238 (1972).

² Scripps Howard, "Texas Poll," (Winter 1999).

³ Scripps Howard, "Texas Poll," (Winter 1999); and Scripps Howard, "Death Penalty," (Spring 2000).

⁴ As referred to by the Associated Press in discussing McCarver's appeal (March 26, 2001).

⁵ *Penry v. Johnson*, 00-6677 (Arguments heard before the Court on March 27, 2001).

⁶ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

⁷ Scripps Howard, "Death Penalty," (Spring 2000).

⁸ *Houston Chronicle*, "A Deadly Distinction," by Mike Tolson (February 4, 2001).

⁹ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹⁰ *New York Times*, "Texas Nears Creation of State Public Defender System" (April 6, 2001).